In the United States Bankruptcy Court
for the
Southern District of Georgia
Brunswick Division

In the matter of:	)	
	)	Adversary Proceeding
BRUCE FREY EICKHOFF	)	
(Chapter 7 Case 93-20820)	)	Number 94-2008
	)	
Debtor	)	
	)	
	)	
	)	
BRUCE FREY EICKHOFF	)	
	)	
Plaintiff	)	
	)	
	)	
	)	
v.	)	
	)	
NANCY ANNE EICKHOFF	)	
	)	
Defendant	)	

MEMORANDUM AND ORDER

Debtor, Mr. Bruce Frey Eickhoff, initiated this proceeding on March 7, 1994, seeking a determination that certain debts owed to his ex-wife, Nancy Anne Eickhoff, are dischargeable in his Chapter 7 bankruptcy. Ms. Eickhoff timely filed her Answer and Counterclaim on March 10, 1994. Debtor timely filed his Answer to Ms. Eickhoff's Counterclaim on March 23, 1994. The matter was tried in Brunswick on August 10, 1994. Based upon the evidence adduced at trial, the parties' arguments and applicable authorities, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Mr. Eickhoff and Ms. Eickhoff were formerly Husband and Wife, their marriage of approximately thirty (30) years having been dissolved on September 2, 1986, under a Divorce Decree entered in the Court of Common Pleas of Chester County, Pennsylvania. Prior thereto, and during the pendency of the divorce action, the parties entered into a Settlement Agreement dated August 5, 1985, settling all issues relating to their respective rights, duties and obligations arising from their marriage, including the matters relating to property division, alimony, custody, visitation and child support. The Settlement Agreement, however, was never made a part of the Pennsylvania Divorce Decree.

Under Section 3 of the Settlement Agreement, entitled "Provisions for Wife", the parties agreed, in pertinent part, as follows:

> 3.1 Alimony. Husband shall pay as alimony $1,400 a month, with yearly increases of 3.5 percent . . . The alimony payments shall continue until Husband's retirement at which time Wife shall receive one-half of Husband's pension and Social Security benefits, to be paid to her within one (1) week of the day or days on which he receives them.
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> Husband's obligation to pay alimony to Wife shall cease upon her death, remarriage or cohabitation.

In addition to the foregoing, Paragraph 3.2 of the Settlement Agreement obligates the Mr. Eickhoff to maintain life insurance on his life with Ms. Eickhoff named as the irrevocable beneficiary in the amounts as set forth therein. This obligation also ceases upon Ms. Eickhoff's death, remarriage, or cohabitation. Paragraph 14 of the Settlement Agreement provides, in pertinent part, as follows:

> 14. Breach. In the event of a breach hereof, the party committing the breach shall be obligated to pay the

> reasonable and necessary costs, including such reasonable legal fees, incurred by the non-breaching party to enforce or protect his or her rights hereunder. The amount of such reasonable costs and legal fees should be determined by the Court having jurisdiction over the subject matter hereof to the extent that such Court shall assume responsibility with respect thereto.

Both parties were represented by counsel during the divorce proceedings and negotiation of the Settlement Agreement. At the time of the execution of the Settlement Agreement, Mr. Eickhoff held a college degree and was employed by E. I. DuPont as a national sales manager earning approximately $5,500.00 per month, plus benefits. Ms. Eickhoff was fifty-three (53) years old, held a high school diploma, and, except for a few part-time jobs at which she earned sums approximating the minimum wage, did not work outside the home during the marriage Ms. Eickhoff's primary responsibilities in the marriage had been to act as a mother for the parties' three (3) boys and to maintain the marital residence.

Three children were born as issue of the parties' marriage. At the time of the execution of the Settlement Agreement, two of the children had already reached the age of majority and left home. The youngest child was eighteen years old at the time the parties entered into the Settlement Agreement, but resided with Ms. Eickhoff while attending college.

At the time of the Settlement Agreement, the parties were living what can conservatively be characterized as a comfortable middle-class existence. They were living in a home valued at approximately $200,000.00 located in a Pennsylvania suburb. They were members of a country club and Ms. Eickhoff was a member of a health club.

In December of 1989, Mr. Eickhoff retired from E. I. DuPont and moved to Georgia. A month later, in January of 1990, he began receiving monthly pension and Social

Security benefits from DuPont in the gross amount of $2,535.00. Through February of 1992, Mr. Eickhoff paid Ms. Eickhoff one-half of this gross amount in accordance with Paragraph 3.1 of the parties' Settlement Agreement. Even after his retirement from E. I. DuPont in 1989, Mr. Eickhoff has declared all payments made to Ms. Eickhoff under Paragraph 3.1 of the Settlement Agreement as alimony on his federal income tax returns and, thus, deducted such sum. Conversely, Ms. Eickhoff has included all payments made to her by Mr. Eickhoff under Paragraph 3.1 of the Settlement Agreement as alimony on her federal tax returns and, thus, paid taxes on the same.

In March of 1992, Mr. Eickhoff remitted only 600.00 to Ms. Eickhoff, and in April and May of that year, he remitted only 500.00 per month. As a result of the decreased payments, Ms. Eickhoff, on June 11, 1992, filed a three-count complaint against Mr. Eickhoff in the Superior Court of Glynn County, Georgia, being Civil Action No. 92-00988, setting forth both legal and equitable theories of recovery. In Count I of her complaint, Ms. Eickhoff sought domestication and "correction" of the Pennsylvania Divorce Decree so as to incorporate the Settlement Agreement therein, as well as a citation of Mr. Eickhoff for being in contempt of the Settlement Agreement. In Count II, she sought specific performance of the Agreement, including future payments due thereunder. In Count III, Ms. Eickhoff sought a money judgment from Mr. Eickhoff based upon his breach of contract in not making the payments required of him under the Agreement. Ms. Eickhoff also sought to recover expenses of litigation including attorney's fees pursuant to Paragraph 14 of the parties' Settlement Agreement.

Mr. Eickhoff answered, asserting that the Settlement Agreement was void. He also counterclaimed seeking a modification of future alimony obligations and recovery of overpayments he had allegedly made to Ms. Eickhoff in previous during his retirement. Mr.

Eickhoff asserted in support of his claim for recovery of overpayments that, if the Settlement Agreement was not void, it obligated him to pay Ms. Eickhoff only one-half of the net, rather than gross, amounts of his monthly pension and Social Security benefits.

Both parties moved for summary judgment, and the Superior Court entered an order resolving the motions as follows:

1) As to Count I of Ms. Eickhoff's complaint, the court refused to incorporate the Agreement into the parties' divorce decree on the ground that it had been omitted due to clerical error. Accordingly, the court was unwilling to enforce the agreement by contempt and granted Mr. Eickhoff's motion for summary judgment as to this Count of the complaint.

2) As to Count II, the court was unwilling to invoke the remedy of specific performance to enforce the Agreement. Accordingly, the court granted Mr. Eickhoff's motion as to this Count.

3) As to Count III, the court found that Mr. Eickhoff had breached the Agreement by not remitting one-half of his gross retirement benefits. Accordingly, Ms. Eickhoff was awarded a money judgment in the amount of $12,925.00.

4) As to Mr. Eickhoff's counterclaim, the court held that, because it had already concluded that it could not domesticate the Agreement and make it an order of the court, it was powerless to modify the agreement. Accordingly, the court granted Ms. Eickhoff's motion to dismiss Mr. Eickhoff's counterclaim.

During the course of the state court litigation, both parties took positions, with respect to their characterization of Mr. Eickhoff's obligations under Paragraph 3.1 of the Settlement Agreement, that are inconsistent with the positions they have taken in this adversary proceeding. In a brief filed in support of her motion to dismiss Mr. Eickhoff's counterclaim for modification of alimony, Ms. Eickhoff argued, in the alternative, that Mr. Eickhoff's obligation was non-modifiable because the same arose pursuant to an equitable division of the material assets rather than an alimony obligation. Therein, Ms. Eickhoff also contended that the obligation was non-modifiable even if the same was determined to be alimony because of certain language in the Agreement to the effect that it was not to be modified at any time by any Court.

Mr. Eickhoff, on the other hand, contended that his obligations to Ms. Eickhoff were modifiable under O.C.G.A. Section 19-6-19, which provides for modification of alimony. Mr. Eickhoff filed a brief in support of his Motion for Summary Judgment which stated, under the heading "Statement of Undisputed Material Facts," as follows:

> 10. Shortly after August 5, 1985, the date the Settlement Agreement was signed, the parties divided all of their marital assets according to the provisions of the Agreement. Therefore, equitable division of property is not and never has been an issue in this case.

Mr. Eickhoff also filed an affidavit in the State Court action wherein he states, under oath, that he is

> [C]urrently obligated to pay the [Ms. Eickhoff] monthly alimony . . . . That at the time of the filing of the State Court action "no marital property remained to be divided. All had been divided long ago according to the terms of the Settlement Agreement . . . "

Both parties appealed the superior court's order on the cross-motions for summary judgment to the Georgia Supreme Court. That Court affirmed the Trial Court's judgment in Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914 (1993).

Following Supreme Court's affirmance of the superior court's decision, Ms. Eickhoff filed garnishment actions in the Superior Court of Glynn County, Georgia, against Mr. Eickhoff, his local bank, and his pension fund to collect on the $12,925.00 judgment. After a hearing on the merits, the superior court dismissed the garnishments as to Mr. Eickhoff, individually, and his pension fund, but allowed the garnishment actions to proceed against Mr. Eickhoff's bank. Both parties appealed this decision to the Georgia Court of Appeals. While these appeals were pending, Mr. Eickhoff filed this Chapter 7 bankruptcy petition on December 20, 1993, and thereafter initiated this proceeding on March 7, 1994.

Mr. Eickhoff seeks a determination from this court that the money judgment for $12,950.00 rendered against him in the Glynn County Superior Court, Ms. Eickhoff's executory claims to one-half of his future pension benefits under Paragraph 3.1 of the Settlement Agreement, and Ms. Eickhoff's and her attorney's claim to legal fees under Paragraph 14 of the Agreement, are all debts that are dischargeable in his Chapter 7 bankruptcy case. Mr. Eickhoff argues in support of the relief he seeks that Ms. Eickhoff is collaterally estopped by the Superior Court's Order and the Georgia Supreme Court's opinion, as well as from the position that Ms. Eickhoff took and statements that she made during the course of the state court litigation, from arguing that these debts are in the nature of alimony. Accordingly, Mr. Eickhoff contends that these debts are actually a property division between him and Ms. Eickhoff, and are therefore dischargeable in his bankruptcy case.

Ms. Eickhoff, on the other hand, asserts that she is not estopped from arguing

that the debts in question are in the nature of alimony and are therefore non-dischargeable under section 523(a)(5) of the Bankruptcy Code. In her Counterclaim, Ms. Eickhoff, seeks an award of reasonable attorney's fees and expenses of litigation for prosecuting and defending this proceeding.

CONCLUSIONS OF LAW

Section 523(a)(5) excepts from discharge a debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child . . .", but only if the debt is "actually in the nature of alimony, maintenance, or support."[1] Because Mr. Eickhoff contends that Ms. Eickhoff is collaterally estopped from asserting that Mr. Eickhoff's obligation under Paragraph 3.1 of the Settlement Agreement is "actually in the nature of alimony, maintenance, or support," the first issue to be resolved is whether the doctrine of collateral estoppel is applicable in this proceeding. This court has recently made the following observation about the doctrine of collateral estoppel:

> [T]here is little question that the doctrine applies to proceedings to determine dischargeability. *See* Grogan v. Garner, 498 U.S. 279, 285, n.11, 111 S.Ct. 654, 658, n.11, 112 L.Ed. 2d 755 (1991); In re St. Laurent, 991 F.2d 672,

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[1] 11 U.S.C. Section 523(a)(5), in relevant part, provides:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt-
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> (5) to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law, a governmental unit, or property settlement agreement, but not to the extent that--
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support.

> 675 (11th Cir. 1993). Collateral estoppel precludes the relitigation of an issue that has been previously decided in a judicial proceeding if the party against whom the prior decision is asserted had a "full and fair opportunity to litigate that issue in an earlier proceeding." In re St. Laurent, 991 F.2d at 675 (*quoting* Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980)). The party seeking to invoke collateral estoppel to preclude relitigation of an issue, bears the burden of proving the existence of the following four elements with respect to that issue:
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> 1) The issue at stake must be identical to the one involved in the prior litigation;
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> 2) The issue must have been actually litigated in the prior judicial proceeding;
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> 3) The determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that action; and
>
> 4) The party against whom the other decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding.
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> Matter of McWhorter, 887 F.2d at 1566 (*citing* I.A. Durbin, Inc. v. Jefferson Nat'l Bank, 793 F.2d 1541, 1549 (11th Cir. 1986)).

Matter of Lutz, 169 B.R. 473, 476-77 (Bankr. S.D.Ga. 1994) (Davis, B.J.).[2] Additionally, the application of collateral estoppel is committed to the sound discretion of the Court. Greenblatt, 763 F.2d at 1360.

There is no dispute that there was a valid final judgment in the State Court action before Judge Tuten. Disposition by Summary Judgment is a decision on the merits, and it is as final and conclusive as a judgment after trial. The critical inquiry, then, is whether the nature of Mr. Eickhoff's obligation to Ms. Eickhoff under Paragraph 3.1 of the Agreement was

[2] *See also* Greenblatt v. Drexel Burnham Lanbert, Inc., 763 F.2d 1352, 1360 (11th Cir. 1985); DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982).

actually litigated and necessary to the superior court's decision in ruling upon the cross-motions for summary judgment. After reviewing the superior court's order, as well as the Supreme Court's opinion affirming the order, this court has absolutely no doubt that the nature of Mr. Eickhoff's obligation was not a critical and necessary part of the superior court's resolution of the parties' cross-motions for summary judgment. The following passage from the court's order is revealing:

> In [Mr. Eickhoff's] original counterclaim, he sought modification of the Separation Agreement by reduction of the existing monthly obligation to [Ms. Eickhoff]. [Mr. Eickhoff] has conceded that the modification of the Agreement is contingent upon the Court's incorporation of the Agreement into the Decree subsequent to domestication, as [Ms. Eickhoff] requests in Count I. Since the Court is without the authority to grant [Ms. Eickhoff's] relief and make the Agreement the Order of the Court, it follows, therefore, that the Court cannot modify the Agreement.

Thus, it is clear that the court did not get to the issue of whether Mr. Eickhoff's obligation under Paragraph 3.1 was in the nature of alimony because it could not incorporate the Agreement into the Decree. That is why the court refused to cite Mr. Eickhoff for contempt of court and to consider modification of Mr. Eickhoff's obligation. Instead, the court simply enforced the Agreement under a standard breach of contract theory.

Moreover, Mr. Eickhoff's further contention that the position taken by Ms. Eickhoff in the superior court action estops her from taking a contrary position does not even merit discussion. Both parties took positions as to the proper characterization of Mr. Eickhoff's obligation under Paragraph 3.1 in the superior court that are contrary to their positions in this court. As pointed out above, however, the superior court did not reach that issue. Accordingly, Ms. Eickhoff is not collaterally estopped from arguing that the Mr.

Eickhoff's obligation under the Agreement is in the nature of support.[3]

As a result, this court must make its own independent determination of the nature of the obligation imposed upon Mr. Eickhoff under the Agreement. The Eleventh Circuit mandates that "what constitutes alimony, maintenance, or support will be determined under the bankruptcy laws, not state laws." In re Harrell, 754 F.2d 902, 905 (11th Cir. 1985) (*quoting* H. R. Rep. No. 595, 95th Cong., 1st Sess. 364 (1977) reprinted in 1978, U.S. Code Cong. & Admin. News 5787, 6319). To be declared non-dischargeable, the debt must have been actually in the nature of alimony, maintenance or support. Harrell, 754 F.2d at 904.

The non-debtor spouse (or spouse asserting an exception to dischargeability) has the burden of proving that the debt is within the exception to discharge. In re Calhoun, 715 F.2d 1103 (6th Cir. 1983). The exceptions to discharge in Section 523 must be proved by a preponderance of the evidence. Grogan v. Garner, 498 U.S. 279, 111 S.Ct. 654, 111 L.Ed.2d 755 (1991).

A determination as to whether or not a debt is in the nature of support requires an examination of the facts and circumstances existing at the time the obligation was created, not at the time of the bankruptcy petition. Harrell, 754 F.2d at 906. *Accord* Sylvester v. Sylvester, 865 F.2d 1164 (10th Cir. 1989); Forsdick v. Turgeon, 812 F.2d 801 (2nd Cir. 1987); Draper v. Draper, 790 F.2d 52 (8th Cir. 1986). It is the substance of the obligation which is dispositive, not the form, characterization, or designation of the obligation under state law.

[3] Even if the superior court had reached the issue of whether the obligation is property characterized as alimony or an equitable property division, this court is not convinced that it would be collaterally estopped from revisiting the issue. It is axiomatic that the nature of such an obligation is to be determined as a matter of federal bankruptcy law in dischargeability actions under section 523(a)(5) of the Code. A bankruptcy court is not bound by the label that the superior court gives such an obligation in the original divorce decree. It stands to reason, therefore, that a bankruptcy court would not be bound by a subsequent order or decree doing the same thing, although either ruling would be entitled to great deference.

In re Bedingfield, 42 B.R. 641, 645-46 (S.D.Ga. 1983). *Accord* Shaver v. Shaver, 736 F.2d 1314, 1316 (9th Cir. 1984); In re Williams, 703 F.2d 1055, 1057 (8th Cir. 1983). According to the Eleventh Circuit in Harrell:

> The language used by Congress in Section 523(a)(5) requires bankruptcy courts to determine nothing more than whether the support label accurately reflects that the obligation at issue is "actually in the nature of alimony, maintenance, or support." The statutory language suggests a simple inquiry as to whether the obligation can legitimately be characterized as support, that is, whether it is in the *nature* of support.

Harrell, 754 F.2d at 906 (emphasis original). Although the Harrell court determined that only "a simple inquiry" was needed, the court did not set forth the guidelines or factors to be considered. Other courts have held that, while bankruptcy law controls, a court may consider state law labels and designations in making its inquiry. *See* In re Holt, 40 B.R. 1009, 1011 (S.D.Ga. 1984) (Bowen, J.).

The Bankruptcy Court must determine if the obligation at issue was intended to provide support. Calhoun, 715 F.2d at 1109. In making its determination, the Court should "consider any relevant evidence including those facts utilized by state courts to make a factual determination of intent to create support." Id. If a divorce decree incorporates a settlement agreement, the Court should consider the intent of the parties in entering the agreement; if a divorce decree is rendered following actual litigation, the Court should focus upon the intent of the trier of fact. In re West, 95 B.R. 395 (Bankr. E.D.Va. 1989). *See generally* In re Mall, 40 B.R. 204 (Bankr. M.D.Fla. 1984) (Characterization of an award in state court is entitled to greater deference when based on findings of fact and conclusions of law of a judge as opposed to a rubber stamped agreement incorporated into a divorce decree); In re Helm, 48 B.R. 215 (Bankr. W.D.Ky. 1985) ("It is not those questions of support which have been fully litigated

and adjudicated in the state court system which are now subject to second-guessing by bankruptcy judges, sitting as 'super-divorce courts.' It is only those cases . . . in which former spouses settle their support differences by agreement albeit with resulting state court approval, that bankruptcy courts may later reopen and re-examine.")

In determining whether an obligation is actually in the nature of support, the following factors may be considered:

> 1) If the circumstances of the parties indicate that the recipient spouse needs support, but the divorce decree fails to explicitly provide for it, a so called "property settlement" is more in the nature of support, than property division. Shaver, 736 F.2d at 1316.
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> 2) "The presence of minor children and an imbalance in the relative income of the parties" may suggest that the parties intended to create a support obligation. Id. (*Citing* Matter of Woods, 561 F.2d 27, 30 (7th Cir. 1977).)
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> 3) If the divorce decree provides that an obligation therein terminates on the death or remarriage of the recipient spouse, the obligation sounds more in the nature of support than property division. Id. Conversely, an obligation of the donor spouse which survives the death or remarriage of the recipient spouse strongly supports an intent to divide property rather than an intent to create a support obligation. Adler v. Nicholas, 381 F.2d 168 (5th Cir. 1967).
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> 4) Finally, to constitute support, a payment provision must not be manifestly unreasonable under traditional concepts of support taking into consideration all the provisions of the decree. *See* In re Brown, 74 B.R.

968 (Bankr. D.Conn. 1987) (College or post-high school education support obligation upheld as non-dischargeable).

Applying these factors to the instant case, it is clear that Ms. Eickhoff has proven by a preponderance of the evidence that the Mr. Eickhoff's obligations under Paragraph 3.1 of the Settlement Agreement requiring him to pay one-half of his monthly pension and Social Security benefits to Ms. Eickhoff and under Paragraph 3.2 of the Agreement requiring him to maintain insurance on his life are actually in the nature of maintenance or support and, thus, non-dischargeable. Both parties were represented by counsel in negotiating the terms and provisions of the Settlement Agreement. The Agreement provides under Paragraph 2 and its sub-parts for the division of real and personal property acquired by the parties during the course of their marriage. Accordingly, the parties sold the marital residence and divided the net proceeds with the Ms. Eickhoff receiving 60% and Mr. Eickhoff receiving 40%. Also, the parties equally divided a savings plan maintained with Mr. Eickhoff's employer. Paragraph 3 of the Agreement, on the other hand, is labeled "Provisions for Wife" and Paragraph 3.2 is labeled "Alimony." The obligations imposed upon Mr. Eickhoff under this paragraph terminate on Ms. Eickhoff's death or remarriage. Thus, it is apparent from the structure of the Agreement that the parties intended the monthly payments under Paragraph 3.2 to be in the nature of maintenance or support.

This conclusion is certainly supported by the financial circumstances of the parties at the time the Agreement was entered. The parties were married for approximately thirty (30) years and maintained what can be fairly described as a "comfortable lifestyle" ($200,000 home, country club and athletic club memberships). Ms. Eickhoff had only a high school education with very little work experience at the time of divorce. Her primary responsibilities during the marriage had been to raise the three children and maintain the

household. Mr. Eickhoff, on the other hand, held a college degree and was a national salesman for DuPont earning $5,500.00 per month, plus benefits. Without question, then, Ms. Eickhoff was in need of support from Mr. Eickhoff at that time.

The intent of the parties is also demonstrated by the manner in which they reported the monthly payments on their respective federal tax returns. The Mr. Eickhoff reported all payments to the Ms. Eickhoff under Paragraph 3.1 of the Settlement Agreement as alimony and, thus, deducted such sums. This is true even after the Mr. Eickhoff retired in December of 1989 and, thereafter, began remitting to the Ms. Eickhoff one-half of his monthly pension and Social Security benefits. Conversely, the Ms. Eickhoff reported all such payments from her former husband, including those representing a sum equal to one-half of his monthly pension and Social Security benefits, as income and paid taxes on the same. As the Supreme Court noted:

> The construction placed upon a contract by the parties thereto, as shown by their acts and conduct, is entitled to much weight and may be conclusive upon them . . . . "[T]he meaning placed on a contract by one party and known to be thus understood by the other party at the time shall be held as the true meaning." O.C.G.A. § 13-2-4.

Eickhoff v. Eickhoff, 263 Ga. 498, 435 S.E.2d 914, 920 (1993).

I conclude, after balancing all of the factors, that Mr. Eickhoff's obligations to Ms. Eickhoff under Paragraphs 3.1 and 3.2 of the Settlement Agreement are in the nature of support. This is true with respect to such obligations that arose prior to the filing of this bankruptcy petition, as well as those arising thereafter.

As to Ms. Eickhoff's claim for attorney's fees, a number of Courts have found attorney's fees awarded pursuant to a divorce decree to be non-dischargeable as in the nature

of support. *See e.g.*, In re Williams, 703 F.2d at 1057; In re Booch, 95 B.R. 852, 855 (Bankr. N.D. Ga. 1988). This case does not, however, concern attorney's fees awarded at the time of the divorce. Rather, the issue to be resolved relates to Mr. Eickhoff's contingent obligation to pay attorney's fees in the State Court action that resulted in an award to Ms. Eickhoff of a judgment against Mr. Eickhoff in the sum of $12,925.00, representing arrearages owed to her under Paragraph 3.1 of the Settlement Agreement.

Paragraph 14 of the parties' Settlement Agreement provides that in the event of a breach thereof, the party committing the breach shall be obligated to pay reasonable costs and attorney's fees. Mr. Eickhoff was found to be in breach of the terms thereof in the amount of $12,925.00 through December 1992.

A number of Circuit Courts have concluded that attorney's fees incurred as a result of a post-divorce custody modification proceeding fall within the exception to discharge for support under Section 523(a)(5). *See* In re Jones, 9 F.3d 878, 881-82 (10th Cir. 1993); Matter of Dvorak, 986 F.2d 940, 941 (5th Cir. 1993); In re Peters, 964 F.2d 166, 167 (2nd Cir. 1992). Moreover, a bankruptcy court in the Middle District of Florida concluded that an award of attorney's fees incurred by a debtor's former wife in defending an action in State Court for relief from the divorce decree brought by the husband was non-dischargeable. In re Williams, 151 B.R. 605 (Bankr. M.D.Fla. 1993). In so ruling, the Court found that the award of attorney's fees was sufficiently related to the obligation of support as to be in the nature of support, and thus, exempted from discharge. Similarly, Courts in this state have held that attorney's fees awarded by a state court in pre-bankruptcy proceedings to enforce as alimony and support divorce order were non-dischargeable. In re Galpin, 66 B.R. 127, 131 (N.D. Ga. 1985).

In view of the conclusion by this Court that Mr. Eickhoff's obligations under Paragraph 3.1 of the Settlement Agreement are in the nature of support and, thus, non-dischargeable, I also conclude that any award of attorney's fees that might be forthcoming to Ms. Eickhoff in the State Court action wherein the Mr. Eickhoff was found to be in arrears of such obligations would, likewise, be in the nature of support and, thus, non-dischargeable.

Finally, Ms. Eickhoff seeks an assessment of attorney's fees arising out of her defense in this action. In Transouth Financial Corp. of Florida v. Johnson, 931 F.2d 1505 (11th Cir. 1991), the Eleventh Circuit held that a prevailing party in a dischargeability action may recover attorney's fees if the same are provided for by an enforceable contract between the parties. Here, the Settlement Agreement specifically provides for attorney's fees and the Ms. Eickhoff has successfully established the non-dischargeability of the obligations in issue. Accordingly, the Ms. Eickhoff is entitled to recover an award of attorney's fees, the exact sum to be determined by this Court upon further hearing regarding same.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the obligation of Plaintiff to pay to Defendant the judgment in the sum of $12,925.00 rendered in the Superior Court of Glynn County, Civil Action Number 92-00988 is non-dischargeable.

IT IS FURTHER ORDERED that Plaintiff's obligations to Defendant pursuant to Paragraphs 3.1 and 3.2 of the parties' Settlement Agreement are non-dischargeable.

IT IS FURTHER ORDERED that any award of attorney's fee that might be

forthcoming to Defendant in the aforesaid State Court action is not dischargeable.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1994.